United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-7612

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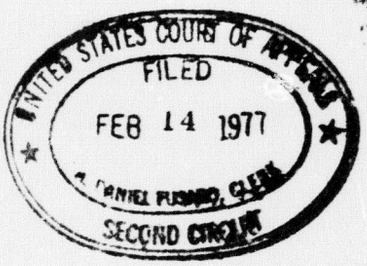
In The

United States Court of Appeals

For The Second Circuit



LOCAFRANCE U.S. CORPORATION,
Plaintiff-Appellant,

-against-

INTERMODAL SYSTEMS LEASING, INC., DANIEL H. OVERMYER, SHIRLEY OVERMYER, JOHN OVERMYER, ELIZABETH OVERMYER, EDWARD OVERMYER, BARBARA STRANG AND "JOHN DOE", THAT NAME BEING FICTITIOUS, THE TRUE NAME OF THE DEFENDANT BEING UNKNOWN TO PLAINTIFF AND THE PERSON INTENDED BEING TRUSTEE f/t/b OF DEFENDANTS JOHN OVERMYER, ELIZABETH OVERMYER, EDWARD OVERMYER AND BARBARA STRANG,

Defendants-Appellees.

On Appeal from a Judgment Entered in the United States District Court for the Southern District of New York.

BRIEF FOR PLAINTIFF-APPELLANT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

LOCAFRANCE U.S. CORPORATION, :

Plaintiff-Appellant, :

-against- :

INTERMODAL SYSTEMS LEASING, INC., :
DANIEL H. OVERMYER, SHIRLEY OVERMYER,
JOHN OVERMYER, ELIZABETH OVERMYER, :
EDWARD OVERMYER, BARBARA STRANG and
"JOHN DOE", that name being fictitious, :
the true name of the Defendant being
unknown to Plaintiff and the person :
intended being trustee f/t/b of
Defendants JOHN OVERMYER, ELIZABETH :
OVERMYER, EDWARD OVERMYER and
BARBARA STRANG, :

Defendants-Appellees. :

----------X

BRIEF OF PLAINTIFF-APPELLANT

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in granting summary judgment dismissing the Complaint in view of the issues of fact presented by the release?

2. Even if issues of fact were not presented by the release, did the District Court erroneously interpret the release as a matter of law?

3. Did the District Court err in precluding Locafrance from adducing parol evidence with respect to the meaning of the release, whether the effectiveness of the release was subject to a condition precedent and whether the release was fraudulently induced?

4. Even if issues of fact were not presented and the release was properly interpreted, did the District Court err in dismissing the Complaint with respect to the individual defendants other than Intermodal?

5. Did the District Court abuse its discretion in not permitting Locafrance to address issues raised by the release?

STATEMENT OF THE CASE

This is an action brought by Plaintiff-Appellant, LOCAFRANCE U.S. CORPORATION ("LOCAFRANCE"), arising out of several financing arrangements entered into between LOCAFRANCE and Defendant-Appellee, INTERMODAL SYSTEMS LEASING, INC. ("INTERMODAL"). The Complaint [A-5a]* alleges that INTERMODAL and Defendants-Appellees, DANIEL H. OVERMYER ("DANIEL"), SHIRLEY OVERMYER ("SHIRLEY"), JOHN OVERMYER ("JOHN"), ELIZABETH OVERMYER ("ELIZABETH"), EDWARD OVERMYER ("EDWARD"), BARBARA STRANG ("BARBARA") and "JOHN DOE", a fictitious name intended to identify a trustee for the benefit of JOHN, ELIZABETH, EDWARD and BARBARA (sometimes jointly referred to herein as the "INDIVIDUAL DEFENDANTS"), made certain material misrepresentations [A-5a, ¶¶ 19 (A-L)] and/or omitted to state material facts necessary to make the representations which were made not misleading [A-5a, ¶¶ 20 (A-C)], all of which resulted in INTERMODAL and the INDIVIDUAL DEFENDANTS being liable to LOCAFRANCE pursuant to the Securities Act of 1933, the Securities And Exchange Act of 1934, the New York General Obligations Law and constituted common law fraud and negligence. The Complaint seeks rescission of the financing arrangements, or, in the alternative, damages in the sum of $732,104.00.

---

* "A" refers to pages in the Joint Appendix.

On September 7, 1976, and prior to filing an Answer, Defendants-Appellees made a motion to dismiss the Complaint as to the various parties on the following grounds: accord and satisfaction, release, statute of limitations, laches, lack of jurisdiction, impermissable use of a "John Doe" pleading, insufficiency of service of process, failure to plead fraud with sufficient particularity pursuant to Rule 9(b) of the Federal Rules of Civil Procedure, that some of the defendants are not controlling persons and lack of subject matter jurisdiction. It was further requested that LOCAFRANCE be required to post security for costs pursuant to §11(e) of the Securities Act of 1933 [A-17a]. Ultimately, the motion was heard on November 4, 1976 and again on November 9, 1976, at which time the District Court advised the parties before argument was heard that it had already resolved the motion. The decision granting summary judgment and dismissing the Complaint as to all Defendants-Appellees was then read into the record [A-343a]. Notwithstanding a request to be heard, the District Court did not permit oral argument by counsel for LOCAFRANCE after the decision was read.

On November 16, 1976, Judgment [A-36a] was entered dismissing the Complaint. On December 8, 1976, LOCAFRANCE filed its Notice of Appeal.

STATEMENT OF FACTS

LOCAFRANCE is a corporation engaged in the business of equipment leasing which includes providing capital financing for commercial entities. INTERMODAL is a corporation representing one part of the vast complex of corporate entities established by DANIEL in the United States, Canada and Europe throughout the last twenty-five years (the "OVERMYER COMPANY") which was generally involved in the leasing and managing of warehouses. At all relevant times DANIEL was virtually the sole owner of the OVERMYER COMPANY and its constituents [A-151a].

In late spring, 1972, INTERMODAL and DANIEL approached LOCAFRANCE to obtain working capital for INTERMODAL to finance the purchase of additional forklift trucks for warehousing purposes. In reliance on many statements and representations made by DANIEL to LOCAFRANCE*, on May 31, 1972, December 7, 1972, June 21, 1973 and August 15, 1974, LOCAFRANCE invested more than one million dollars in INTERMODAL (and, in effect, into the OVERMYER COMPANY). In consideration for these investments LOCAFRANCE was to receive a significant return on its invested money [A-152a, 153a].

---

* These statements and representations are outlined in Paragraphs "19" and "22" of the Complaint [A-5a].

In or about November, 1973 many of the corporate entities within the OVERMYER COMPANY, although not INTERMODAL, filed bankruptcy under Chapter XI in the United States District Court for the Southern District of New York [A-22a]. In December, 1973 and January, 1974, INTERMODAL substantially defaulted on its financing arrangements with LOCAFRANCE and LOCAFRANCE commenced an investigation into INTERMODAL's financial situation. As a result of this investigation, LOCAFRANCE ultimately learned that substantial misrepresentations and omissions had been made by INTERMODAL and DANIEL in connection with the financing arrangements, e.g. fraudulent financial statements [A-153a].

On April 4, 1974, INTERMODAL instituted an action (and sought an injunction) against LOCAFRANCE and ATLAS FORKLIFT RENTAL AND SALES, INC. ("ATLAS") in the Circuit Court of Cook County, Illinois, Chancery Division, wherein it was alleged that LOCAFRANCE and ATLAS conspired to deprive INTERMODAL of its customer lists and clientele and to misappropriate INTERMODAL's customers with the intent to destroy INTERMODAL's business [A-23a, 154a, 215a]. Numerous hearings were held in Chicago, Illinois on INTERMODAL's application for the preliminary injunction. When it became apparent that a settlement proposed by INTERMODAL would provide LOCAFRANCE with a return, albeit on a

deferred basis, of its invested monies, settlement discussions ensued and a settlement agreement [A-26a] was entered into between and among LOCAFRANCE, INTERMODAL and ATLAS. At DANIEL's request, INTERMODAL's performance under the proposed settlement agreement was deferred until August, 1975. Other provisions of the agreement were structured so as to make it as convenient as possible for INTERMODAL to perform [A-154a]. In connection with the settlement of the Chicago action, the following documents were prepared:

(a) A nineteen (19) page agreement between LOCAFRANCE and INTERMODAL with eleven (11) schedules annexed thereto, dated June 18, 1974 [A-26a].

(b) An amendment to the June 18, 1974 agreement dated June 28, 1974, consisting of five (5) pages [A-95a].

(c) A release dated June 18, 1974 in favor of LOCAFRANCE executed by INTERMODAL [A-93a].

(d) A release dated June 18, 1974 in favor of INTERMODAL executed by LOCAFRANCE [A-104a].

(e) A six (6) page agreement between LOCAFRANCE and ATLAS with exhibits annexed thereto [A-27a].

Both of the releases executed by INTERMODAL and LOCAFRANCE were entered into as part and parcel of the entire settlement agreement and both releases contained the following language:

> "The effectiveness of this release is dependent upon an agreement dated the 18th day of June, 1974 between INTERMODAL SYSTEMS LEASING, INC., and LOCAFRANCE U.S. CORPORATION becoming effective in accordance with its terms. The terms, conditions, covenants and agreements contained in said agreement are specifically excluded from this release, as are the terms, conditions, covenants and agreements contained in Lease No. 057/82/000 ---/0 between LOCAFRANCE U.S. CORPORATION, Lessor, and INTERMODAL SYSTEMS LEASING, INC., Lessee."

Paragraph "6" of the June 18, 1974 agreement provided:

"6. ISLI covenants and agrees that it will liquidate the Indebtedness to Locafrance as follows:

6.1 During the month next following the month in which this Agreement is executed, and during each of the next following eleven months, no payments in reduction of the Indebtedness shall be made.

6.2 During each of the thirteenth through twenty-fourth months next following the month following the month in which this Agreement is executed, by the payment of $5,000 to Locafrance in each of said months.

6.3 During each of the twenty-fifth through forty-eighth months next following the month following the month in which this Agreement is executed, by the payment of $10,000 to Locafrance in each of said months.

6.4 Commencing with the forty-ninth month next following the month following the month in which this Agreement is executed by the payment of $15,000 to Locafrance in each of the next following months until the total amount of the Indebtedness has been paid in full.

6.5 All payments shall be made at the offices of Locafrance at the address set forth above by check, or by bank to bank transfers, and shall be due at said offices, or Locafrance's bank, as the case may be, on the fifteenth day of each month in which a payment is to be made."

Almost immediately after the settlement agreement was executed, INTERMODAL was in default with respect to obligations unrelated to the payment of money [A-155a]. When INTERMODAL was required to commence making payments under the settlement agreement in August, 1975, the payments were not made. These defaults did not result from a lack of money but were more apparently based on a lack of intent to perform the settlement agreement, which intent had existed at the time the agreement was executed [A-156a].

On June 7, 1976 this action was filed [A-5a]. On September 7, 1976, Defendant-Appellees moved to dismiss the Complaint on numerous grounds [A-17a]. Oral argument was initially scheduled for November 4, 1976. However, the District Court interrupted oral argument by reason of the failure of Defendants-Appellees to have identified the trustee for the benefit of JOHN, ELIZABETH, EDWARD and BARBARA and directed such disclosure by November 8, 1976. Oral argument was re-scheduled for November 9, 1976. On November 9, 1976, the District Court, after obtaining the identity of the trustee, proceeded to read its written opinion in open court [A-347a]. After determining that by reason of the release executed by LOCAFRANCE, which it found to be wholly unambiguous, the District Court granted summary judgment dismissing the Complaint in favor of all Defendants. The following colloguy occurred:

> MR. ATLAS: May I be heard, your Honor?
>
> THE COURT: I have rendered my decision. I have read all these papers. I don't want to hear anything more. [A-353a]

Although counsel attempted to address the issues of the intent of the parties in executing the release, as well as the fraudulent intent of INTERMODAL in obtaining the release, the District Court stated:

> "I think I have heard enough Mr. Atlas. Go tell it to the Court of Appeals. It is a ridiculous lawsuit." [A-355a].

SUMMARY OF THE ARGUMENT

The release executed by LOCAFRANCE in favor of INTERMODAL alone was but one portion of a settlement agreement resolving a litigation instituted by INTERMODAL in Chicago, Illinois against LOCAFRANCE and another entity. The District Court, in holding that Defendants-Appellees were entitled to summary judgment solely on the ground of the release, was in error because, by its own terms, the release presents issues of fact. The District Court failed to consider, inter alia, either the intent of the parties as to the purpose of the release, the interrelationship between the release and the contemporaneously executed settlement agreement or whether the release was fraudulently induced. Likewise, the District Court's opinion that INTERMODAL's non-performance of the settlement agreement was irrelevant is based on an unreasonable construction of the release. The release should properly have been interpreted as dependent upon performance of the settlement agreement. Any other interpretation renders the parties' qualifying language in the release completely superfluous.

Nevertheless, assuming, arguendo, that the foregoing construction of the release is not patently clear, parol evidence should have been considered as to the circumstances surrounding

execution of the release, including the meaning of any ambiguity in the release, whether the release was dependent upon the condition precedent that INTERMODAL perform the settlement agreement and whether the release was fraudulently induced.

In addition, by reason of the District Court's limitation upon oral argument, LOCAFRANCE was substantially prejudiced by being precluded from establishing, inter alia, that the release was fraudulently induced. LOCAFRANCE is entitled to an adjudication of that (and other) triable issues of fact whether by means of rebutting an affirmative defense of release or amending the Complaint to add a claim for rescission of the release.

In any event, the District Court improperly granted summary judgment in favor of all Defendants-Appellees in view of the fact that only INTERMODAL executed the release and only INTERMODAL was a party to the litigation in Chicago, Illinois. The INDIVIDUAL DEFENDANTS as controlling persons can be held liable for securities acts violations committed by INTERMODAL, the controlled person, regardless of the independent liability of INTERMODAL. At the very least, a question of fact is presented as to whether the INDIVIDUAL DEFENDANTS were controlling persons and/or controlled INTERMODAL.

POINT I

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING THE COMPLAINT BECAUSE THE EFFECT OF THE RELEASE PRESENTS ISSUES OF FACT

In its opinion, the District Court held that, "... the Defendants[Appellees] are entitled to summary judgment dismissing the complaint and denying all relief..." [A-353a] solely on the ground that LOCAFRANCE executed a general release in favor of INTERMODAL on June 13, 1974. In holding that "[t]he release is an absolute defense" [A-353a], however, the District Court failed to consider, inter alia, either the intent of the parties with respect to the purpose of the release or the interrelationship between the release and the settlement agreement which was executed at the same time*, each of which constituted a material issue of fact.** The District Court therefore clearly erred in granting summary judgment notwithstanding, indeed without even considering, these material issues of fact.

* Other than noting that the language of the release stated that the release was conditioned upon the settlement agreement becoming effective in accordance with its terms, the failure of which condition "cannot be claimed" by LOCAFRANCE [A-352a].

** Material issues of fact were also presented with respect to the meaning of the release, whether the release was subject to a condition precedent and whether the release was fruadulently induced. See POINTS IV and V, infra.

It is well settled in New York that the effect to be given a release is dependent upon the intent of the parties in executing the release and/or the interrelationship between the release and a settlement agreement entered into at the same time.

> "In determining the effect of a release, the basic inquiry is the intention of the parties and the purpose for which the release was given ... and it must be construed in connection with the agreement, which was entered into at the same time ... It is thus settled that broad, general language in a release must yield to the intention of the parties ..." Baka v. Board of Education of City of New York, 11 M. 2d 441, 444,174 N.Y.S. 2d 704, 708 - 709 (Sup. Ct. N.Y. Co. 1958) (Citations Omitted).

> "Although the effect of a general release, in the absence of fraud or mutual mistake, cannot be limited or curtailed ..., its meaning and coverage necessarily depend, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given. Certainly, a release may not be read to cover matters which the parties did not desire or intend to dispose of." Cahill v. Regan, 5 N.Y. 2d 292, 299, 184 N.Y.S. 2d 348, 354 (1959) (Citations Omitted).

> "An examination of the cited decisions of the New York Courts teaches that whether a general release is to be treated as including all possible claims depends upon the purpose for which it was given; that even though it be general in form, it cannot be held, as a matter of law, that a given claim was barred thereby unless it be shown that the subject-matter was actually in question at the giving of the release." Graham v. Taller & Cooper, Inc., 91 F. Supp. 419, 420 (E.D.N.Y. 1950) (Citations Omitted).

See also Matter of Delaware Co. Elec. Coop. v. City of New York, 304 N.Y. 196, 106 N.E. 2d 605 (1952), Dufour v. Lobdell, 74 M. 2d 460, 344 N.Y.S. 2d 158 (Sup. Ct. Otsego Co. 1973) and Mangini v. McClurg, 24 N.Y. 2d 556, 301 N.Y.S. 2d 508 (1969). LOCAFRANCE's

opposition to the motion of the Defendants clearly placed the intent of LOCAFRANCE with respect to the purpose of the release in issue. Thus, as stated in the affidavit of Mr. Paul W. Siege, Vice-President of LOCAFRANCE [A-154a, 155a, ¶6]:

> "It should also be pointed out that at no time during the negotiations for the settlement agreement did LOCAFRANCE agree to release forever any potential liability of Defendants [Appellees] for fraud. Since these issues were not wholly relevant to the Chicago action and since LOCAFRANCE did not truly focus on this aspect, the settlement agreement did not address itself to that matter."

The District Court, however, did not consider the restrictive intent of LOCAFRANCE with respect to the settlement agreement or the release which was a part of the settlement agreement in determining the instant motion. If such consideration had been given, at the very least, a question of fact would have been presented.

Likewise, other than noting that the release stated that it was conditioned upon the settlement agreement becoming effective by its terms, the District Court failed to consider the interrelationship between the settlement agreement and the release. Focus upon this issue would have revealed that LOCAFRANCE reasonably believed that the settlement agreement, and therefore the release which constituted only one part of the agreement, was not binding or effective until the terms and conditions of the settlement agreement had been performed by INTERMODAL, which

performance was not to commence until approximately one (1) year after the settlement agreement was executed. Consequently, Mr. Siege was justifiably surprised when INTERMODAL posited a contrary interpretation of the release:

> "The truth is that INTERMODAL never did [comply with the terms and conditions of the settlement agreement]. It is indeed strange that the position INTERMODAL takes is that a 'settlement agreement' which it never intended to perform, never did perform, should constitute a bar to LOCAFRANCE seeking the very relief which Defendants [Appellees] intended to dealy [sic]." [A-156a, ¶9].*

At the very least, it is clear that as with LOCAFRANCE's intent regarding the scope and purpose of the release, a question of fact existed with respect to the interrelationship between the release and the settlement agreement, both of which were disregarded by the District Court.

By reason of the foregoing issues of fact regarding intent and/or the interrelationship between the release and the settlement agreement, it was clearly improper for the District Court to grant summary judgment under the law of the State of New York:

---

* Because the meaning and construction of the release was not clearly placed in issue until the District Court determined the instant motion, LOCAFRANCE did not fully address the issue of its intent and understanding with respect to the purpose and scope of the release.

> "This is not an appropriate case for summary judgment which would either dismiss the plaintiff's complaint or dismiss the affirmative defense of release because the parties' intent -a fact question- has been placed in issue (CPLR 3212; Walker v. Maeweather, 76 Misc. 2d 671, 351 N.Y.S. 2d 319). Rather, the plaintiff's complaint should be reinstated and this matter remitted for an immediate trial on the issue of intent (CPLR 3212(c))." Dury v. Dunadee, 52 A.D. 2d 206, 209-210, 383 N.Y.S. 2d 748, 751 (4th Dept. 1976).

See also Pascoe v. Electromatic Manufacturing Corp., 3 A.D. 2d 818, 161 N.Y.S. 2d 365 (1st Dept. 1957) and Back v. Bergstein, 12 A.D. 2d 636, 208 N.Y.S. 2d 895 (2d Dept. 1960). The same rule obtains in federal courts pursuant to Rule 56 of the Federal Rules of Civil Procedure. Thus, in Gordon v. Vincent Youmans, Inc., 358 F. 2d 261 (2d Cir. 1965), this Court reversed the granting of summary judgment based upon a release on the ground that contemporaneous assignments (or agreements) raised questions of fact regarding the meaning of the release and the intent of the parties with respect to the same:

> "We believe that these doubts as to the meaning of the release and the two assignments preclude summary judgment. The three agreements present a confusing picture. The case must be remanded for a trial of the facts in order to resolve the doubts. There is no other way to establish the true intent of the parties." (358 F. 2d at 264).

Similarly, in Fournier v. Canadian Pacific Railroad, 512 F. 2d 317 (2d Cir. 1975), this Court reversed summary judgment because an issue of fact existed with respect to whether the parties intended to settle certain claims by means of a general release:

> "On a motion for summary judgment, furthermore, the inferences drawn from the facts before the court must be viewed in the light most favorable to the party opposing the motion ... If when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits.
>
> * * *
>
> ... the court, on a motion for summary judgment, cannot try issues of fact but can only determine whether there are issues of fact to be tried; and once having determined this affirmatively must leave those issues for determination at trial ..." (512 F. 2d at 318-319) (Citation Omitted).

See also Mustang O.. Company v. Crown Central Petroleum Co., 52 F.R.D. 207 (W.D. N. Car. 1971); United States v. Ramstad Construction Co., 194 F. Supp. 379 (D. Alaska 1961); Michael Rose Productions v. Loew's Incorporated, 143 F. Supp. 606 (S.D. N.Y. 1956) and 6 (Pt.2) Moore's Federal Practice ¶56.17[49].

As indicated above, in determining the instant motion the District Court did not consider the issues of the intent of the parties with respect to the release or the interrelationship between the release and the settlement agreement, each of which constituted material issues of fact and were, under the circumstances, presented or contained in the papers submitted by LOCAFRANCE in opposition to the motion. Had due consideration been given or afforded, it would have been clear that LOCAFRANCE did not intend the release to encompass any claims presently contained in the Complaint and, in any event, did not intend the release to be binding until the terms and conditions of the settlement agreement had been performed by INTERMODAL.

Consequently, questions of fact were presented which should have precluded the District Court from construing the release based upon the papers before it and, a fortiori, from granting summary judgment. Accordingly, the granting of summary judgment was clearly erroneous.

POINT II

THE DISTRICT COURT ERRED AS A MATTER OF LAW IN ITS CONSTRUCTION OF THE RELEASE

On April 4, 1974, INTERMODAL instituted an action against LOCAFRANCE and ATLAS in the Circuit Court of Cook County, Illinois, Chancery Division, seeking an injunction and essentially alleging that LOCAFRANCE and ATLAS had conspired and unlawfully misappropriated INTERMODAL's customers with the intent to destroy INTERMODAL's business. Extensive discovery was conducted by the parties and numerous hearings were held in Chicago, Illinois. Ultimately, a settlement of the action was consummated between and among INTERMODAL, ATLAS and LOCAFRANCE. In connection with the settlement, the following documents were prepared and/or executed:

1. A nineteen (19) page agreement between LOCAFRANCE and INTERMODAL with eleven (11) schedules annexed thereto, dated June 18, 1974.

2. An amendment to the June 18, 1974 agreement dated June 28, 1974 consisting of five (5) pages.

3. A release dated June 18, 1974 in favor of LOCAFRANCE executed by INTERMODAL.

4. A release dated June 18, 1974 in favor or INTERMODAL executed by LOCAFRANCE.

5. A six (6) page agreement between LOCAFRANCE and ATLAS with exhibits annexed thereto.

At its request, payments by INTERMODAL under the settlement agreement were deferred until August, 1975, more than one year later and INTERMODAL has been in default of its obligations under the settlement agreement since that time.

The release executed by LOCAFRANCE was but one of a series of documents executed by the parties in connection with and as part of the settlement agreement. In addition to the printed text of the release form, the release contained the following typewritten language:

> "The effectiveness of this release is dependent upon an agreement dated the 18th day of June, 1974 between Intermodal Systems Leasing, Inc. and Locafrance U.S. Corporation becoming effective in accordance with its terms. The terms, conditions, covenants and agreements contained in said agreements are specifically excluded from this release, as are the terms, conditions, covenants and agreements contained in Lease No. 057/82/000 --- /0 between Locafrance U.S. Corporation, Lessor, and Intermodal Systems Leasing, Inc., Lessee."

In granting Defendants-Appellees' motion to dismiss this action, the District Court held [A-350a, 351a]:

> "On June 18, 1974, Locafrance U.S. Corporation executed a traditional form general release in favor of the defendant Intermodal Systems Leasing, Inc. This was given on the usual form No. B 111, the so called Blumberg Form of General Release. It was acknowledged and delivered in New York and duly notarized. It is not ambiguous. No resort to parole [sic] evidence is needed here in connection with this paper [A-350a].

* * *

> The document, the general release, has the well known effect of releasing and forever discharging Intermodal Systems Leasing, Inc., its successors and assigns, of and from all manner of actions, causes of actions, suits ... from the beginning of the world to the date of the release, which is June 18, 1974 [A-351a].
>
> * * *
>
> The release contains a provision to the effect that it is dependant [sic] upon an agreement dated the same date becoming effective in accordance with its terms.
>
> It does not state that the effectiveness of the release is conditioned upon performance of that agreement, but expressly says merely upon it becoming effective in accordance with its terms. It cannot be claimed the settlement agreement of the Cook County case and did not become effective in accordance with its terms.
>
> That it was not fully performed is besides the point ... [A-351a, 352a].
>
> * * *
>
> We are talking here about a general release for which there was adequate consideration under New York law, and which, by its terms, became effective on the discontinuance and settlement of the Cook County litigation [A-352a].
>
> * * *
>
> For that ground alone, the defendants are entitled to summary judgment dismissing the complaint and denying all relief, and it is so ordered." [A-352a].

Accordingly, the District Court held that irrespective of the issue of performance of the settlement agreement (and irrespective of the issue of intent to perform the settlement agreement), the release operated as a complete bar to the maintenance of LOCAFRANCE's action.

It is submitted that the District Court's construction of the release is totally unreasonable.* As the facts at trial would demonstrate, it was the intent of the parties that the release would be binding only upon performance by INTERMODAL of its obligations under the settlement agreement. In accordance with this intent, the release should be interpreted to have stated that it was dependent upon the settlement agreement "becoming effective in accordance with [performance of] its terms".

Any other construction, including that of the District Court, would render the aforecited language (as typewritten in the release) completely superfluous. Thus, the District Court essentially held that the language in the release meant that the release would be binding when the settlement agreement was executed. However, because the release was executed as a part of and contemporaneously with the settlement agreement, the same result, i.e., that the release was binding when executed, could have been attained by not inserting any typewritten language in the release. Indeed, the standard form lease as printed could have been utilized by the parties without any further expression. The parties, however, inserted a specific qualification to the standard form printed lease. To therefore hold that the effect of such qualification was to eliminate the necessity for inserting the qualification in the first place or merely to effectuate

* As noted in POINT IV , infra, the holding of the District Court would provide for dismissal even against the INDIVIDUAL DEFENDANTS who did not execute the release and were not parties to the Chicago action or the settlement agreement.

an intent or result which already existed is clearly unreasonable. Consequently, the only reasonable construction of the release is that its effectiveness was dependent upon INTERMODAL's performance of the settlement agreement.

This construction is further supported by the fact that the release "specifically" excluded the terms and conditions of inter alia, the settlement agreement, supra. The only possible reason for excluding the terms of an agreement simultaneously executed with a release is that the release was intended to be dependent upon the excluded terms. Since dependence upon a term, qua a written term, is meaningless, it must be concluded that the release was dependent upon performance of the excluded terms.

Therefore, the only reasonable interpretation of the release is that it was only to be binding, and was dependent, upon INTERMODAL performing the terms and obligations of the settlement agreement. Indeed, there is no rational support for any other interpretation. Accordingly, the District Court clearly erred as a matter of law in its construction of the release.

POINT III

IN CONSTRUING THE RELEASE THE DISTRICT COURT SHOULD HAVE PERMITTED LOCAFRANCE TO ADDUCE PAROL EVIDENCE

The District Court determined that:

> "No resort to parole [sic] evidence is needed here in connection with this paper [the release]." [A-351a].

In construing the release, however, the District Court should have considered parol evidence because (a) at the very least, the release is on its face ambiguous, (b) LOCAFRANCE should have been permitted to establish by parol evidence that the effectiveness of the release was dependent upon INTERMODAL satisfying the condition precedent that it perform the terms and conditions of the settlement agreement, and (c) LOCAFRANCE should have been permitted to establish that its execution of the release was fraudulently induced by INTERMODAL.

As noted in POINT II, supra, LOCAFRANCE contends that the release, on its face, requires the conclusion that it is dependent upon INTERMODAL performing its duties and obligations pursuant to the settlement agreement. However, assuming, arguendo, that the release does not clearly indicate that its effectiveness is dependent upon INTERMODAL's performance under the settlement agreement, at the very least, the qualifying language of the release, supra, is ambiguous, thereby requiring resort to parol evidence to ascertain the meaning and effect of the release:

"On the other hand, when a written contract is unclear or ambiguous in its meaning or application, parol and other extrinsic evidence is admissible to explain or interpret the writing (Concoff v. Occidental Life Ins. Co. of Calif., 4 N.Y. 2d 630, 176 N.Y.S. 2d 660, 152 N.E. 2d 85). The preliminary question to be resolved is whether or not there is an ambiguity.

The traditional view is that the search of the ambiguity must be conducted within the "four corners" of the writing, unaided by any reference to external circumstances (Sec: 30 Am. Jr. 2d Evidence Sec. 1066). However, this Court will adopt the more modern and enlightened view, and accept any evidence of the parties' negotiations and of any other relevant external circumstances in order to ascertain whether a written contract is ambiguous. (Anno. Ambiguity in Contracts -- Extrinsic Evidence, 40 A.L.R. 3rd 1384, Sec. 4 and cases cited therein; Restatement on Contracts Sec. 242). The ultimate goal of the judicial system is to ascertain the truth and any evidence which aids the Court in its search should be admissible; the weight to be given to the evidence is for the Court or a Jury. Contrary to plaintiff's position the Court is not rewriting the contract, but looking for the parties' intention.

* * *

Parol evidence is admissible '... for the purpose of applying the terms of a contract to its subject and removing any ambiguity which arises from such application, (and) it is permissible to show by the declarations of the parties before or at the time of the contract or afterwards what was meant by its terms.' (Murdock v. Gould, 193 N.Y. 369 at 375, 86 N.E. 12 at 14, emphasis added; 32A C.J.S. Evidence §960 at p. 405; Richardson on Evidence, 10th Ed. Sec. 625 et seq.)." Todem Homes, Inc. v. Freidus, 84 M. 2d 1023, 374 N.Y.S. 2d 923, 929-930 (Sup. Ct. Suffolk Co. 1975) (Emphasis Added).

Similarly, in 67 Wall Street Company v. Franklin National Bank, 37 N.Y. 2d 245, 371 N.Y.S. 2d 915 (1975), the Court of Appeals held parol evidence admissable to construe ambiguous language:

> "Although recognizing the proposition that words are never to be construed as meaningless if they can be made significant by any reasonable construction (Matter of Buechner, 226 N.Y. 440, 443, 123 N.E. 741, 742; Allen v. Forsyth, 25 N.Y.S. 2d 822, 825; R.I. Realty Co. v. Terrell, 254 N.Y. 121, 124, 172 N.E. 262, 263), we also recognize that if several such constructions are possible, the court can look to the surrounding facts and circumstances to determine the intent of the parties (O'Neil Supply Co. v. Petroleum Heat & Power Co., 280 N.Y. 50, 55-56, 19 N.E. 2d 676, 679; St. Regis Paper Co. v. Hubbs & Hastings Paper Co., 235 N.Y. 30, 35-36, 138 N.E. 495, 496; Lamb v. Norcross Bros. Co., 208 N.Y. 427, 431, 102 N.E. 564, 565; Levinson v. Shapiro, 238 App. Div. 158, 160, 263 N.Y.S. 585, 587, affd. 263 N.Y. 591, 189 N.E. 713; 4 Williston, Contracts §618). Thus, while the parol evidence rule requires the exclusion of evidence of conversations, negotiations and agreements made prior to or contemporaneous with the execution of a written lease which may tend to vary or contradict its terms (Newburger v. American Sur. Co., 242 N.Y. 134, 142, 151 N.E. 155, 157), such proof is generally admissible to explain ambiguities therein (O'Neil Supply Co. v. Petroleum Heat & Power Co., supra; Kalmon Dolgin Co. v. Walnut Lanes, 27 A.D. 2d 843, 278 N.Y.S. 2d 158; Smathers v. Standard Oil Co. of N.Y. 199 App. Div. 368, 371, 191 N.Y.S. 843, 845, Affd. 233 N.Y. 617, 135 N.E. 942; Anchin, Block & Anchin v. Pennsylvania Coal & Coke Corp., 284 App. Div. 940, 941, 134 N.Y.S. 2d 737, 739, affd. 308 N.Y. 985, 127 N.E. 2d 842)." (371 N.Y.S. 2d at 918) (Emphasis Added).

In an action quite similar to the case at bar, Adams v. Judson, 243 App. Div. 404, 277 N.Y.S. 304 (1st Dept. 1935), plaintiff sought to recover monies allegedly received by defendant upon the sale of certain stock belonging to the plaintiff. Defendant denied the existence of any agreement to pay the proceeds of the stock to the plaintiff and, inter alia, asserted a release as an affirmative defense. In reversing summary judgment in favor of the defendant, the Appellate Division held:

> "We think the alleged release is not sufficiently free from ambiguity to justify summary judgment dismissing the complaint. It is by no means clear that the defendant was released from individual liability as distinguished from liability incurred as an officer or director of Columbia Concerts Corporation. Recourse may be had, therefore to parol evidence to explain its effect. Such evidence 'is admissible to apply a writing to its subject.' (Mullen v. Washburn, 224, N.Y. 413, 420) and in Piedmont Hotel Co. v. Nettleton Co. (263 N.Y. 25, 30) it was recognized that sometimes 'evidence is necessary to establish in what sense' a release shall be operated. If such evidence is necessary on account of ambiguity, then the effect of the release cannot be determined upon affidavits which disclose a controverted state of facts. (Brainer v. Mendelson Bros. Factors, Inc. 262 N.Y. 53, 56)." (243 App. Div. at 406).

Not only should parol evidence have been adduced with respect to any ambiguity in the release, but, in addition, the District Court should have permitted LOCAFRANCE to establish by parol evidence that the effectiveness of the release was dependent upon INTERMODAL satisfying the condition precedent of performance under the settlement agreement. Thus, in Hicks v. Bush,

10 N.Y. 2d 488, 225 N.Y.S. 2d 34 (1962), an action for specific performance of a written merger agreement among a partnership and certain corporations, the Court of Appeals held that parol evidence could be adduced to establish that the parties had orally agreed that the legal effectiveness of the agreement was subject to a condition precedent (the procurement of certain expansion funds):

> "The applicable law is clear, the relevant principles settled. Parol testimony is admissible to prove a condition precedent to the legal effectiveness of a written agreement (see Saltzman v. Barson, 239 N.Y. 332, 337, 146 N.E. 618, 619; Grannis v. Stevens, 216 N.Y. 583, 587, 111 N.E. 263, 265; Reynolds v. Robinson, 110 N.Y. 654, 18 N.E. 127; see, also, 4 Williston, Contracts [3d ed., 1961], §634, p. 1021; 3 Corbin, Contracts [1960 ed.], §589, p. 530 et seq.), if the condition does not contradict the express terms of such written agreement. (See Fadex Foreign Trading Corp. v. Crown Steel Corp., 297 N.Y. 903, 79 N.E. 2d 739, affg. 272 App. Div. 273, 274-276, 70 N.Y.S. 2d 892, 893-894; see, also, Restatement, Contracts, §241.) A certain disparity is inevitable, of course, whenever a written promise is, by oral agreement of the parties, made conditional upon an event not expressed in the writing. Quite obviously, though, the parol evidence rule does not bar proof of every orally established condition precedent, but only of those which in a real sense contradict the terms of the written agreement." (225 N.Y.S. 2d at 36) (Emphasis Added) (Citations Omitted).

In the case at bar, the language of the release is not inconsistent, nor is there any contradiction, with the condition precedent of INTERMODAL's performance of the settlement agreement.* In McManus v. Boddison, 152 Misc. 239, 272 N.Y.S. 199 (Sup. Ct. N.Y. Co. 1934), the Court held that it was empowered to ascertain the conditional nature of a broad general release:

* It cannot be over-emphasized that where, as here, the payment of monies by INTERMODAL to LOCAFRANCE was deferred more than one year at INTERMODAL's request, it is highly improbable that the parties intended the release to become effective upon mere signing.

> The execution of a release is however, an act distinct from its delivery and while parol evidence is incompetent to change or explain the meaning of the release, oral evidence may be received to show whether the delivery of the instrument was intended to be absolute or conditional." (152 Misc. at 241) (Emphasis Added) (Citations Omitted).

See also Sterling v. Chapin, 185 N.Y. 395, 78 N.E. 158 (1906). Under the instant facts, LOCAFRANCE does not seek to change or alter the release but merely the opportunity to show that the release was conditioned upon performance of the settlement agreement by INTERMODAL. In Procopis v. G.P.P. Restaurants, Inc., 43 A.D. 2d 974, 352 N.Y.S. 2d 230 (2d Dept. 1974), the Appellate Division reversed the lower court's exclusion of oral testimony regarding a condition precedent to a written contract stating:

> "We disagree with the trial court in two respects. First, it was improper for the trial court to exclude proof that there was a condition precedent to the contract taking effect. "Parol testimony is admissible to prove a condition precedent to the legal effectiveness of a written agreement * * *, if the condition does not contradict the express terms of such written agreement" (Hicks v. Bush, 10 N.Y. 2d 488, 491, 225 N.Y.S. 2d 34, 36, 180 N.E. 2d 425, 427; see, also, Spina v. Ferentino, 30 A.D. 2d 1034, 294 N.Y.S. 2d 721).
>
> In the case before us the evidence offered neither contradicted nor negated a term of the writing. It sought merely to prove a condition precedent before the contract could become effective. The statement in the contract, in effect, that the written document embodies the agreement of the parties and may not be changed or terminated orally has no significance until there is a contract."(352 N.Y.S. 2d at 232).

See also Warshaw v. Hassid, 41 A.D. 2d 652, 340 N.Y.S. 2d 666 (2d Dept. 1973); Schenectady Discount Corporation v. Myers, 5 A.D. 2d

728 168 N.Y.S. 2d. 727 (3d Dept. 1957); and Epstein v. Paganne Ltd., 44 A.D. 2d 520, 353 N.Y.S. 2d 190 (1st Dept. 1974).

Finally, the District Court improperly disregarded the existence of parol evidence with respect to the issue that the release (and the settlement agreement of which it was a part) was fraudulently induced or obtained by INTERMODAL.* It is well established that where the giving or obtaining of a release is tainted by fraud, such a release has no validity. Auld v. Estridge, 86 M. 2d 895, 382 N.Y.S. 2d 897 (Sup. Ct. Nassau Co. 1976); In Re Kelleher's Will, 19 A.D. 2d 147, 241 N.Y.S. 2d 275 (4th Dept. 1963); Walter v. Collins, 5 A.D. 2d 358, 171 N.Y.S. 2d 1020 (3rd Dept. 1958); Wheeler v. State of New York, 286 App. Div. 310, 143 N.Y.S. 2d 83 (3rd Dept. 1955). In the case of In Re Cohen's Estate, 12 M. 2d 784, 177 N.Y.S. 2d 245 (Surr. Ct. N.Y. Co. 1958), a situation similar to that at bar, the executors pleaded a release of the decedent's estate as an affirmative defense

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* This issue was raised in the opposing affidavits of LOCAFRANCE:

> "These defaults arose not from the aspect of lack of money but obviously from lack of intent in any way to perform under the agreement. In my opinion, the extensive negotiations leading to the settlement agreement and the settlement agreement itself contained numerous misrepresentations and was intended solely to lull LOCAFRANCE into a false sense of secuirty [sic] and to defer the filing of the instant action. I believe that the settlement agreement was nothing more than an effort by Defendants to divert LOCAFRANCE from the fraud." [A-155a, ¶7].

> "In fact, as part of Defendants continuing fraud LOCAFRANCE is investigating the representation that DANIEL H. OVERMYER specifically induced these sub-lessees not to make any payments to LOCAFRANCE." [A-206a, ¶5, footnote]

in a proceeding to re-open a decree admitting a will to probate. As to the petitioner's contention that the issue of fraudulent procurement had been raised, the Court stated:

> "If fraud has been effectively pleaded and were to be established by the proof in support of the petitioner's charge she would then be entitled to rescission of the release and so avoid it as a total bar to the relief she seeks (Frankenheim v. B. Altman & Co., Freke v. Schuldermachter, supra).
>
> * * *
>
> "Though poorly drawn and despite its additional defect resulting from the failure to make any reference to restitution as a condition to rescission of the release the pleading may nevertheless be said to raise a triable issue of fact as to the understanding between the parties regarding *** the basis for the release" Frankenheim v. B. Altman & Co., 1 A.D. 2d 200, 202, 149 N.Y.S. 2d 11, 13. Under such circumstances this court feels itself under a duty to permit the petitioner to serve and file an amended reply containing a plain and concise statement of the specifications of fraud upon which she relies." (177 N.Y.S. 2d at 250) (Citations Omitted).

Consequently, whether the release was fraudulently obtained presents an issue of fact which should have precluded the granting of summary judgment.* Furthermore, LOCAFRANCE should have been permitted to establish the existence of the fraud by INTERMODAL in connection with the release by parol evidence:

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* See POINT I, supra.

> "... it is settled that, if a promise was actually made with a preconceived and undisclosed intention of not performing it, it constitutes a misrepresentation of 'a material existing fact' upon which an action for rescission may be predicated ...
>
> * * *
>
> ... the parol evidence rule has no application in a suit brought to rescind a contract on the ground of fraud. In such a case, it is clear, evidence of the assertedly fraudulent oral misrepresentation may be introduced to avoid the agreement..." Sabo v. Delman, 3 N.Y. 2d 155, 160, 164 N.Y.S. 2d 714, 716 (1957) (Citations Omitted).

See also Millerton Agway Cooperative, Inc. v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18 (1966); Whipple v. Brown Brothers Company, 225 N.Y. 237, 121 N.E. 748 (1919); and In Re Reif's Will, 30 N.Y.S. 2d 47 (Surr. Ct. Westchester Co. 1941), wherein the Court stated that "... where there is created the slightest suspicion of fraud ..., it is not only the right but the duty of the court to inquire into the full details of such a transaction." (30 N.Y.S. 2d at 50). (Emphasis Added).

By reason of the foregoing the District Court should have permitted LOCAFRANCE to clarify the meaning of any ambiguity contained in the release by parol evidence and/or to establish by parol that the release was subject to a condition precedent and fraudulently induced. In failing to consider such evidence, the District Court clearly erred in granting summary judgment dismissing the Complaint.

POINT IV

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING THE COMPLAINT AS TO ALL DEFENDANTS

In its opinion, the District Court held that:

> "... the defendants are entitled to summary judgment dismissing the complaint and denying all relief..." (Emphasis Supplied)[A-353a].

This determination as to all the defendants was predicated upon the existence of a release from LOCAFRANCE to INTERMODAL alone dated June 18, 1974 [A-104a]. Assuming, arguendo, that the release is effective with respect to INTERMODAL*, the release is expressly limited to INTERMODAL and does not, nor was it intended to include a release of any person or entity other than INTERMODAL. The release is therefore ineffective with respect to the other INDIVIDUAL DEFENDANTS named in this action. Accordingly, the District Court's holding that "the defendants" are entitled to summary judgment by reason of the release constitutes clear and reversible error. Neither the release, nor any other part of the record, supports summary judgment in favor of the INDIVIDUAL DEFENDANTS.

* Contrary to the conclusion of the District Court, LOCAFRANCE contends the release is not effective with respect to INTERMODAL. See POINT II, supra.

The only possible basis for discontinuing this action against and granting summary judgment in behalf of the INDIVIDUAL DEFENDANTS would be on the theory that their liability is predicated in the first instance on a finding that INTERMODAL is liable and that since INTERMODAL has been released, the INDIVIDUAL DEFENDANTS can therefore not be held liable. Such a theory, however, is untenable.

The basis for liability of the INDIVIDUAL DEFENDANTS named in this action is that they are each a "controlling person" of INTERMODAL as that term is defined in Section 20 of the Securities And Exchange Act of 1934 and in Section 15 of the Securities Act of 1933 [A- ¶¶4-10].* As controlling persons, the INDIVIDUAL DEFENDANTS are liable for the acts and conduct of INTERMODAL, the "controlled person", if they "... fall within ... [the] definition of control and ... are in some meaningful sense culpable participants in the fraud perpetrated by controlled persons." Lanza v. Drexel & Co., 479 F. 2d 1277, 1299 (2d Cir. 1973). See also Rochez Brothers, Inc. v. Rhoades, 527 F. 2d 880 (3rd Cir. 1975). Furthermore, a controlling person may be liable

* The sections in both statutes are substantially identical and are similarly interpeted Kamen & Co. v. Paul H. Aschkar & Co., 382 F. 2d 689 (9th Cir. 1967).

for the conduct of the controlled person even if the controlled person is not, in the first instance, held liable. Thus, in Kemmerer v. Weaver, 445 F. 2d 76 (7th Cir. 1971), a case involving claims of fraud pursuant to the Securities Act of 1933 and the Securities And Exchange Act of 1934 where the "controlled person" was dismissed because of lack of jurisdiction, in considering the independent liability of controlling persons the Court stated:

> "Defendants' first argument is that since ... Association [the "controlled person"] was found "not liable" the individual defendants [the "controlling persons"] should likewise be held not liable due to the wording of 15 U.S.C. §78t(a) [Section 20]. In other words, defendants contend that if the agent Association is not liable, then the principal (individual defendants) likewise cannot be liable. We disagree.
>
> The premise of this argument is that there is a finding of "no liability" with respect to the ... Association. No such finding exists, it appearing instead that the Association was dismissed from the suit for lack of jurisdiction due to a failure to obtain service of process. It further appears that the reason for the failure to obtain process was that the Association had been dissolved on the initiative of many of the individual defendants in the present suit. On such facts it is evident that 15 U.S.C. §78t(a) is of no avail to defendants.
>
> The plaintiffs argue correctly that there is nothing in the statutes or regulations which prohibits the suing of the principal controlling party or parties under 15 U.S.C. §78j(b) or Rule 10B-5 if the facts in the case so present themselves. The trial court found such facts were present and permitted the action to continue against the controlling party under Rule 10b-5. We hold that the trial judge correctly held that these individual defendants could be liable as controlling persons." (445 F. 2d at 78 - 79) (Footnote Omitted).

A similar conclusion was implicitly reached by the Court in Jackson v. Bache & Co., 381 F. Supp. 71 (N.D. Cal. 1974). In Jackson, plaintiffs sued an individual who was at various times employed as a registered representative by the co-defendant brokerage firms of Bache & Co., Inc. ("Bache") and Burnham & Co., Inc. ("Burnham") for, inter alia, violations of Rule 10b-5 of the Securities And Exchange Act of 1934. After initially concluding that no claim existed against the registered representative, the Court then went on to consider whether Bache and Burnham were independently liable as "controlling persons" of the registered representative pursuant to Section 20. Although it was ultimately held that neither Bache nor Burnham was liable, this conclusion was predicated on the fact that each had established the "good faith" defense afforded by Section 20 and not on the basis that the controlled person/registered representative was not held liable. The Court therefore necessarily first concluded that a controlling person can be liable for violations committed by the controlled person even absent a holding that the controlled person is liable. A contrary conclusion would render the extended discussion of Section 20 by the Court in Jackson irrelevant.

A controlling person can therefore be held liable for federal securities acts violations committed by the controlled person without the controlled person being held liable in the first instance pursuant to Section 20 of the Securities And Exchange Act of 1934 and Section 15 of the Securities Act of

1933. Consequently, under the facts in the instant case, there can be no basis for the granting of summary judgment as to the controlling INDIVIDUAL DEFENDANTS even if LOCAFRANCE executed an effective release with respect to INTERMODAL. At the very least, a question of fact is presented as to whether the INDIVIDUAL DEFENDANTS were controlling persons and/or controlled INTERMODAL. The District Court's blanket dismissal of "the defendants", including the INDIVIDUAL DEFENDANTS, in this action solely upon the existence of the release in favor of INTERMODAL was therefore clearly erroneous.

POINT V

THE DISTRICT COURT ABUSED ITS DISCRETION IN NOT PERMITTING LOCAFRANCE TO ADDRESS ISSUES RAISED BY THE RELEASE

After Defendants-Appellees submitted an exhaustive memorandum of law in support of their motion to dismiss and LOCAFRANCE had served its opposing affidavit and memorandum of law, Defendants-Appellees, raised, in effect for the first time, the issue of the release in their reply memorandum [A-312a], and only after LOCAFRANCE had seemingly disposed of the issue in connection with its discussion of an accord and satisfaction. Accordingly, in its surreply memorandum of law [A-328a], LOCAFRANCE stated:

> "As an afterthought, Defendants, argue that the execution of a release by LOCAFRANCE and INTERMODAL in the fact [sic] of Defendants almost conceded failure to comply with the settlement agreement, has some significance. As Defendants are obviously well aware, the execution of releases by the parties was conditioned, naturally, upon performance of the agreement and [in] the absence of such performance, such a release is inoperative and of no effect." [A-332a-333a].

On November 4, 1976, counsel for the parties appeared before the District Court for oral argument of the motion. At that time, the District Court expressed extreme displeasure with the failure of Defendants-Appellees' counsel to identify the trustee for the

benefit of JOHN, ELIZABETH, EDWARD and BARBARA, directed Defendants-Appellees' counsel to identify the trustee and adjourned oral argument until November 9, 1976. If on November 4, 1976 the District Court was considering a dismissal of the Complaint based on the release, adjourning oral argument and directing Defendant-Appellees' counsel to identify the trustee was wholly inconsistent therewith. In any event, counsel appeared before the District Court on November 9, 1976 [A-343a] at which time the District Court, after obtaining the identity of the trustee, proceeded to read its opinion in open court. After the opinion was read, the following colloquy occurred:

> "This is all, gentlemen.
>
> Mr. ATLAS: May I be heard, your Honor?
>
> The COURT: I have rendered my decision. I have read all these papers. I don't want to hear anything more." [A-353a].

When LOCAFRANCE sought an opportunity to argue, inter alia, that the parties did not intend the release to relate to anything other than the settlement of the Chicago action and to further show the proper construction of the release, the District Court stated, inter alia:

> "I think I have heard enough, Mr. Atlas. Go tell it to the Court of Appeals. It is a ridiculous lawsuit." [A-355a].

Thus, in addition to the fact that the issue of the release was only belatedly raised by the Defendants-Appellees, after the District Court rendered its decision based upon this relatively obscure point it precluded LOCAFRANCE from addressing the issue. Had LOCAFRANCE been given the opportunity to respond to the issue of the release and the District Court's conclusions in connection therewith, the issues or points discussed herein, supra, would have at least been considered by the District Court. It is, therefore, respectfully submitted that the District Court abused its discretion in not allowing such issues to be raised, thereby substantially prejudicing the rights of LOCAFRANCE.

The prejudice resulting from the District Court's refusal to consider the issues raised herein may be clearly demonstrated by analogizing to what would have occurred with respect to only one of those issues (fraudulent inducement) in the absence of the instant motion. Had Defendants-Appellees answered the Complaint rather than moving to dismiss, presumably* the release would have been asserted as an affirmative defense. LOCAFRANCE could then have either conducted pre-trial discovery to establish that the release was tainted by fraud in the inducement or could have sought leave to amend its Complaint in order to seek rescission of the release on similar grounds. Thus, in Cohen v. Tenney Corporation, 318 F. Supp. 280 (S.D.N.Y. 1970), in discussing the subject of a release and the circumstances

* Assuming Defendants-Appellees in fact intended the release to be effective when executed and not be dependent upon performance by INTERMODAL of the settlement agreement.

surrounding its execution, Judge Tyler stated in his original opinion denying defendant's motion for summary judgment that:

> "Plaintiffs' first line of defense against the effect of the releases on their state and common law action appears to be fraud. As always in this litigation, the parties are determined that they will "[b]y indirections find directions out" and to that end have submitted typically turgid and confused papers of a fully Polonian quality. The contention of fraud drifts across the sky appearing now like a camel, now like a weasel and at times disappearing altogether. It would be a worthless exercise to attempt to be precise about just what fraud in the obtaining of the releases plaintiffs presently claim. This may well be an issue on which discovery should be granted before summary judgment or partial dismissal of the complaint is ordered since many of the crucial facts may be now known only to the defendants. See Schoenbaum v. Firstbrook, 405 F. 2d 215 (2d Cir. 1968).
>
> In fairness, I must assume that plaintiffs do claim some sort of fraud in the obtaining of the general release. If they can prove it, that should be sufficient to remove the bar which the release sets up to their non-federal claims.[*] Goostree v. P. Lorillard Co., 26 Misc. 2d 109, 202 N.Y.S. 2d 456 (Sup. Ct., N.Y. Cty. 1960); Waters v. Collins, 5 A.D. 2d 358, 171 N.Y.S. 2d 1020 (3d Dept. 1958); In Re Cohen's Estate, 12 Misc. 2d 784, 177 N.Y.S. 2d 245 (Surrogates Ct., N.Y. Cty.), aff'd 6 A.D. 2d 1033, 178 N.Y.S. 2d 1017 (1st Dept. 1958)." (318 F. Supp. at 283) (Emphasis Added).

On further reflection after defendant's motion for reargument, Judge Tyler opined:

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* The release could not operate as a bar to the federal claims by reason of §29 of the Securities and Exchange Act (15 U.S.C.§78cc), according to Judge Tyler's opinion, later modified.

"The inquiry, however, does not end here. Judicial hostility toward waivers generally requires that the right of private suit for alleged violations be scrupulously preserved against unintentional or involuntary relinquishment. Otherwise, recognition of settlements would indeed undermine, rather than abet, the cause of effective enforcement of the interest which the community as a whole, as well as the aggrieved individual, has in regulation of securities markets. Cf. Wilko v. Swan, supra, Pearlstein v. Scudder & German, supra, 429 F. 2d 1136, see Note, 73 Yale L.J. 1477, 1487 (1964). This court, therefore, must afford the parties opportunity to produce evidence of the circumstances surrounding the obtaining of the release, in the same fashion as discussed in Part II. Accordingly, defendant's motion for summary judgment on the claims arising under the federal securities laws is denied without prejudice to possible later renewal."(318 F. Supp. at 284) (Emphasis Added).

Merely because Defendants-Appellees chose to proceed by a motion to dismiss should not prejudice LOCAFRANCE and preclude it from raising the issues discussed herein. Consequently, even if it were determined that no triable issues of fact are presented and the District Court construed the release properly as a matter of law, at the very least, this case should be remanded to afford LOCAFRANCE the opportunity to seek rescission of the release. Downey v. Palmer, 114 F. 2d 116 (2d Cir. 1940).

CONCLUSION

By reason of the foregoing, it is respectfully requested that the Judgment entered in the District Court be reversed.

Respectfully Submitted,

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A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

FEDERAL COURT
SECOND CIRCUIT

LOCAFRANCE U.S. CORPORATION,
Plaintiff-Appellant,

- against -

INTERMODAL SYSTEMS LEASING, INC., DANIEL H. OVERMYER, SHIRLEY OVEEMYER, JOHN OVERMYER ELIZABETH OVERMYER, EDWARD OVERMYER, ETC.,
Defendants-Appellees,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York.

That on the **14th** *day of* **Feb.** *19* 77 *at* **6 East 39 th St. New York, N.Y.**

deponent served the annexed *upon* **Easton & Echtman, Esqs.**

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this 14th
day of **Feb.** *19* **77**

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Victor Ortega
Victor Ortega